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In The

Supreme Court of the United States

October Term, 1998

KENNETH M. ZERAN

Petitioner,

vs.

AMERICA ONLINE, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals misconstrue and misapply Section 230 of the Communications Decency Act to immunize America Online, Inc. from liability for its negligence and to apply the Act in such a way as to bar Petitioner's recovery for acts which significantly predated the adoption of the Act?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 2

Statement of the Case 4

A. Procedural Background and The Complaint 5

B. Background Prior to Enactment of Section 230 of the CDA 9

C. Decisions of the District and Fourth Circuit 10

D. The Lower Courts Have Misconstrued The Statute 11

1. Section 230 (c) (1) 12

2. Section 230 (d) (3) 13

E. The Petitioner's Claims Were Not Barred Even Though the Petitioner's Suit Was Filed After the Effective Date of the CDA 14

Reasons for Granting the Writ 17

I. The Petition Should be Granted Because the Error of the Court Below adversely Impacts the Public Interest and Safety and This Case Presents the Court the First Opportunity to Interpret the Limits of the Immunity Granted Online Service Providers by the CDA.

II. The Petition Should be Granted Because the Court of Appeals' Application of the CDA to Retroactively Bar Petitioner's State Tort Claim Conflicts with the Court's Recent Retroactivity Jurisprudence.

CONCLUSION 23

APPENDIX

Opinion of the Court of Appeals for the Fourth Circuit (November 12, 1997)..... A-1

Order of the United States Court of Appeals for the Fourth Circuit Denying Petitioner's Motion for Rehearing with Suggestion for *En Banc* Review (December 9, 1997)..... A-19

Memorandum of United States District Court for the Eastern District of Virginia (March 21, 1997) A-21

TABLE OF CITATIONS

Cases Cited

Cubby, Inc. v. CompuServe, Inc., et al.,
776 F.Supp 135 (S.D.N.Y. 1991) 7, 8, 9, 11, 12

Hughes Aircraft Co. v. U.S. ex rel. Schumer,
__ U.S. _, 117 S.Ct. 1871 (1997) 14, 15, 16

Landgraf v. USI Film Products, 511 U.S.
244, 114 S.Ct. 1483 (1994) 14, 15, 16

Reno v. American Civil Liberties Union,
117 S.Ct. 2329 (1997) 18

Rivers v. Roadway Exp., Inc.,
511 U.S. 298, 114 S.Ct. 1510 (1994) 14

Smith v. California, 361 U.S.
147 (1959) 9

Stratton-Oakmont Inc. v. Prodigy Service Co., Inc.,
1995 WL 323710
(Sup. Ct. N.Y. May 24, 1995) 9, 10, 11, 12

Zeran v. America Online,
Inc., 958 F.Supp. 1124 (E.D.Va. 1977) ..... 1, *passim*

Zeran v. America Online,
Inc., 129 F.3d 327 (4th Cir.1997) ..... 1, *passim*

Statutes Cited:

28 U.S.C. § 1254(l) 1

47 U.S.C. § 223 18

47 U.S.C. § 223(a)(1)(C) 4, 20

47 U.S.C. § 230 ..... 9, 10, 12, 13, 17, 18, 20, 21

47 U.S.C. § 230(b)(5) 20

47 U.S.C. § 230(c) 10, 11, 12, 17, 18, 20, 21

47 U.S.C. § 230(c)(1) 11, 12

47 U.S.C. § 230(c)(2)(A) 14, 18, 19

47 U.S.C. § 230(c)(2)(B) 14, 19

47 U.S.C. § 230(d)(1) 20

47 U.S.C. § 230(d)(3) 13, 17, 20

Rules Cited:

Federal Rule of Civil Procedure 12(b)(6) 5

Federal Rule of Civil Procedure 12(c) 1, 5

Other Materials:

H.R. Conf. Rep. No. 104-458, at 194 (1996) 10

141 Cong. Rec. H 8460, 8471. (August 5, 1995) 13

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(Glasser Legal Works 1998) 19

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61 Albany L.Rev. 147 (1997) 19

Petitioner KENNETH ZERAN respectfully prays that based upon significant questions as to the construction and application of Section 230 of the Communications Decency Act (the "CDA") stated in the Questions Presented herein, this Court grant a writ of *certiorari* to review the decision of the United States Court of Appeals for the Fourth Circuit which affirmed entry by the United States District Court for the Eastern District of Virginia of judgment on the pleadings dismissing ZERAN's pending action under Rule 12(c) of the Fed.R.Civ.P.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's motion for rehearing with suggestion for *en banc* review, without opinion, has not been reported, but in reproduced in the Appendix. (App. A-19) The Order of the United States Court of Appeals for the Fourth Circuit affirming the United States District Court for the Eastern District of Virginia was reported at 129 F.3d 327 (4th Cir. 1997) (App. A).

The Order of the United States District Court for the Eastern District of Virginia dismissing the action was reported at 958 F.Supp. 1124 (E.D.Va. 1997).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on November 12, 1997. The Order of the Court of Appeals denying Petitioner's timely motion for rehearing with suggestion for *en banc* review was dated and entered December 9, 1997. (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

Section 230 of the Communications Decency Act reads as follows:

Section 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(b) It is the policy of the United States--

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking and harassment by means of computer.

(c) Protection for 'good samaritan' blocking and screening of offensive material.

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of:

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other criminal statute.

. . . . . .

(3) State Law

Nothing in this section shall be construed to prevent any state from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 223 provides:

Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications

(a) Prohibited general purposes

Whoever--

(1) in interstate or foreign communications

. . . . .

(C) makes a telephone call or utilizes a telecommunication device, whether or not the conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communication.

. . . . .

shall be fined under Title 18, or imprisoned not more than two years, or both.

STATEMENT OF THE CASE

Two fundamental questions are presented by this case: (1) whether Section 230(c) of the CDA, 47 U.S.C. § 230(c), can be properly construed to immunize proprietary computer online service providers ("OSPs") from state common law negligence liability, by absolving them from any legal duty to injured parties in their capacity as distributors of defamatory, fraudulent, harassing, or otherwise injurious subject matter after receiving actual notice that such subject matter was being posted on their own proprietary bulletin boards, and (2) whether the CDA which became effective February 6, 1996, was properly invoked to bar a claim which arose during April and May of 1995, but which was not filed until after the effective date of the CDA.

For purposes of this Petition it is accepted that Respondent AMERICA ONLINE, INC. ("AOL") failed to use reasonable care to expeditiously delete the offending posting, prevent its reposting or post an appropriate notice itself of the bogus nature of the subject matter.

A. **Procedural Background and The Complaint**

ZERAN filed his complaint on April 23, 1996, in the United States District Court for the Western District of Oklahoma.[1] Discovery ensued. Respondent AOL moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Fed.R.Civ.P. and/or to transfer the action to the United States District Court for the Eastern District of Virginia. The motion to transfer was granted and the motion to dismiss reserved for the transferee court and the case was then transferred on October 28, 1996. Discovery continued. Respondent next moved pursuant to Rule 12(c) of the Fed.R.Civ.P. for judgment on the pleadings and concurrently withdrew its Motion to dismiss pursuant to Rule 12(b)(6) of the Fed.R.Civ.P. Oral argument was held on the motion on February 28, 1997, after which the District Court stayed discovery. The court granted AOL's motion on March 21, 1997.

ZERAN's complaint averred that ZERAN, an accomplished artist, photographer, filmmaker, and interviewer, operating out of his home in Seattle, Washington, publicized his telephone in connection with various businesses.

On April 25, 1995, in the wake of the unprecedented terrorist act in the April 19th bombing of the Murrah building in Oklahoma City, an unidentified AOL user posted on AOL bulletin boards the availability for sale "Naughty Oklahoma T-Shirts", which listed the notice to be "From: Ken ZZ03"[2],

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[1] On January 4, 1996, before the effective date of the CDA, alleging facts identical to those contained in the AOL Complaint, plaintiff sued an Oklahoma City radio station that broadcast the original AOL posting. (cf. Ex. A and Ex. B to AOL's Brief in Support of Its Rule 12 Motion to Dismiss or, In The Alternative, To Transfer).

[2] "Ken ZZ03" is a "screen name" utilized by AOL members, the true

giving ZERAN's Seattle business phone. ZERAN, never having been an AOL member, first discovered the existence of the posting from a journalist that had located it on the bulletin board of the Michigan Military Movement. The listing was a vicious, cruel hoax designed to generate outrage at the purported seller in all those who read it or heard about it.[3]

When ZERAN was notified of the posting, that same day he notified AOL both by telephone and later by letter, requesting that the posting be deleted and that appropriate notice be placed on AOL that the posting was bogus.[4] AOL

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identity of the member being generally known only to AOL. AOL maintains a database with the name, addresses, phone numbers and credit card numbers of each member searchable by screen name. In the case of the person posting the "Naughty Oklahoma T-Shirts", he was able to provide false information to AOL so as to avoid detection, because AOL did not verify member information before allowing the new member to go online utilizing one of the trial memberships that AOL disseminated by the millions through direct mail, in magazines and books and loaded on to the hard disks of new computers. AOL's trial memberships offering free hours of on-line time are so ubiquitous that the court and its staff have undoubtedly received more than one. In the case of Ken Z033, after that membership he fraudulently obtained was terminated, he used at least two more AOL memberships with bogus information and similar screen names (Ken ZZ033 and Ken Z033) to post increasingly offensive items for sale.

[3] At a time when bodies were still being dug out of the rubble of the Murrah bombing and funerals for victims were being conducted by the dozens, the "naughty" t-shirts included the slogans "Rack'em, Stack'em and Pack'em-Oklahoma 1995", "Putting the Kids to bed . . . Oklahoma 1995" and "McVeigh for President 1996". Subsequent bogus postings added "Forget the rescue, let the maggots take over-Oklahoma 1995" and "Finally a day care center that can keep the kids quiet--Oklahoma 1995". *Zeran*, 958 F.Supp. at 1127 n. 5.

[4] Since he was not an AOL member, Petitioner had no capability to respond to these postings with his own disclaimers of his innocence placed throughout the AOL system. Since he was not an AOL member, Petitioner is in a very different position from AOL members and AOL's refusal to post such disclaimers was a breach of its duty of care to Petitioner.

declined to post any such notice on its system and the posting remained on and/or was reposted with slightly different screen names, always using ZERAN's telephone number, for at least a week. As a result of AOL's failure to expeditiously delete the posting and/or prevent the repeated further postings by failing to take adequate electronic blocking measures[5], ZERAN's telephone was tied up with obscene, harassing telephone calls, and he endured the further dissemination of the bogus posting attributed to him through a radio broadcast on an Oklahoma City station on May 1, 1995, which generated extremely violent, aggressive phone calls including numerous death threats.

ZERAN sued AOL for negligence as a distributor for failure to exercise a reasonable standard of care to protect ZERAN from the foreseeable consequences of the bogus posting. ZERAN averred in his complaint that AOL owed a duty of care as a substantial commercial operator of its own computer bulletin board, after receiving actual notice of the offending posting, to take appropriate remedial action, such as screening out the incendiary and/or bogus material as well as his telephone number posted on its computer bulletin board service. The complaint expressly averred that AOL was on constructive notice by reason of the law enunciated in *Cubby, Inc. v. CompuServe, Inc. et al.*, 776 F. Supp. 135 (S.D.N.Y. 1991), that it was obligated after due notice to be able to screen incendiary, defamatory and/or bogus material, a standard applied to interactive computer services providers in their capacity as distributors of information as determined in

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[5] Petitioner alleged that readily available internal computer procedures and/or computer programs existed which would have allowed AOL to block any further attempts to place more postings on AOL using Petitioner's phone number. With a blocking program in effect, any such Ken Z postings would have been intercepted by AOL before they appeared on AOL's service. Liability for negligence in adopting blocking measures is one of Petitioner's distributor theories.

Cubby, Inc.[6]

With the significant exception of the court's characterization of this case as one involving the Internet[7], the facts were fairly presented by the District Court. By way of emphasis, the facts establish that AOL had actual notice of the damaging bogus posting on its proprietary computer bulletin board through the direct notification by ZERAN himself, to AOL's personnel, both oral and by letter. Secondly, ZERAN was not a member of AOL and had no standing or ability to protect himself as to the bogus posting using his first name, distinctive initial and telephone number. Thirdly, the averments that AOL had the capability or should have had the capability of screening and blocking the bogus posting, after having received actual notice, is deemed true.

That the complaint fairly states a claim for negligence based upon the standard applied to a distributor (as compared with a publisher) of content is not at issue. 958 F. Supp. 1124 (E.D. Va.), *aff'd.* 129 F.3d 327 (4th Cir. 1997).

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[6] Both courts below insisted on casting Petitioner's claim as a defamation claim (e.g. "Although Zeran artfully attempts to plead his claims as ones of negligence . . .", 129 F.3d at 332), despite Petitioner's specific allegations of fault-based acts which breached common law duties of care imposed on AOL. Moreover, the "artfully" comment which implies some last-minute attempt to plead around § 230, ignores the specific rebuttal to similar assertions by AOL, including letters from Petitioner's counsel to AOL asserting distributor negligence months before the CDA was adopted. (see Brief in Opposition to Defendant's Motion for Judgment on the Pleadings at 6-8, especially Exs. D, June 26, 1995, letter and E, August 4, 1995, letter to the Affidavit of Leo Kayser, III).

[7] As more fully discussed below, this case involves a private, proprietary, member-only OSP with many features unique to AOL and strict rules governing member online conduct-a stark contrast to the free-for-all nature of the Internet characterized by the court. 958 F.Supp. at 1126, ft. 1. Indeed, the use of OSPs such as AOL as a gateway to the Internet (no one can get into AOL from the Internet except AOL members) is completely irrelevant to the events of this case.

The District Court in granting AOL's motion for judgment on the pleadings equated publisher liability with distributor liability for purposes of § 230(c) of the CDA, even though § 230(c) does not use the word distributor or in any way indicate the intent of Congress to overrule *Cubby, Inc.*, supra, which held computer service providers to be treated as distributors and not as publishers for purposes of liability with respect to injurious content posted on their proprietary systems. The import of *Cubby, Inc.* was to absolve such providers from any legal duty to screen, block or otherwise edit in the course of postings or transmissions any of the content that might appear on their systems in the absence of notice. On the other hand, **with notice**, such providers still had a duty to persons who foreseeably could be injured due to content posted on their systems on the analogous basis of a bookstore, news vendor, or library.

B. **Background Prior to Enactment of Section 230 of the CDA**

The scienter standard as applied to distributors of content is compelled by the First Amendment as noted by the *Cubby, Inc.* court:

> The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment." Id. at 139. (Emphasis added, citing *Smith v. California*, 361 U.S. 147 (1959)).

Then, in 1995 *Stratton-Oakmont Inc. v. Prodigy Service Co., Inc.*, 1995 WL 323710 (Sup. Ct. N.Y. May 24, 1995) was decided, in which that court held that a cyberspace

distributor, in part, because it was prescreening some content for distasteful words, was held to be a publisher and, thus, strictly liable for false information published on one of its bulletin boards. Unlike, ZERAN, no notice had been given to Prodigy of the allegedly false information by Stratton-Oakmont or anyone else.

The legislative history on § 230 of the CDA demonstrates expressly that the purpose of § 230, was to overrule *Stratton-Oakmont*, supra, and encourage computer services providers to edit, screen out or block offensive content without risk of exposure to liability as a publisher.

Specifically, the Conference Report on Section 230 stated:

> One of the specific purposes of [Section 230] is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users **as publishers or speakers of content** that is not their own **because they have restricted access to objectionable material**. (Emphasis added.)

H.R. Conf. Rep. No. 104-458, at 194 (1996). The headings for § 230 and § 230(c) quoted above, make it express that the purpose of the statute is to provide protection for "private blocking and screening of offensive material" and for "Good Samaritan Blocking and Screening" consistent with the overruling of *Stratton-Oakmont*. Nothing in § 230(c) overrules the actual notice standard for distributorship liability enunciated in *Cubby, Inc.*

C. **Decisions of the District Court and Fourth Circuit**

The District Court rested its decision on two grounds concluding that the term "publisher or speaker" which is not

defined in the CDA or its legislative history, encompasses distributors, such as AOL. Secondly, the trial court determined that the Congressional intent of promoting content monitoring would be undermined unless distribution liability was deemed preempted.

The Fourth Circuit adopted the District Court's conclusions, but went well beyond the statute and legislative history in finding a broad objective to promote free speech in a provision of the CDA crafted to encourage content screening and blocking of certain content.

D. **The Lower Courts Have Misconstrued The Statute**

Both the District Court and the Court of Appeals exaggerated the burden placed on OSPs like AOL which would arise from imposing distributor liability on them based upon Petitioner's claim. Whereas because of the many transmissions daily it would be virtually impossible for either an Internet Service Provider ("ISP") or major OSP to screen them in advance (consistent with the duty of a publisher), because of the availability of electronic means such as blocking programs (alleged in the Complaint), proprietary OSP's like AOL can meet the demands of distributor liability (need to act arises only after notice) regardless of the volume of their system traffic. This distinction supports § 230(c) as having been designed by Congress to impact only **publishers** and to avoid the *Prodigy* case results-a distinction that escaped both the District Court and the Court of Appeals.

Moreover, both Courts' construction of an impossibility of meeting the duty of a distributor, in addition to having incorrectly supplied a intent for Congress that is patently missing from the Act itself (i.e. Congress was aware of the publisher and distributor dichotomy from *Stratton-Oakmont* and *Cubby, Inc.* and could have easily added "distributor" in § 230(c)(1), but did not do so), the Circuit

Court also necessarily pronounces the policy behind § 230 as being a futile goal.

1. Section 230(c)(1)

Although the term publisher is not defined in the statute, legislative history shows that Congress was concerned about publisher liability as imposed in *Stratton-Oakmont*, supra, wherein the court there expressly distinguished between publishers, on the one hand, and distributors, such as AOL. It was this narrow definition, and not a broader definition taken from the Restatement of Torts relied upon by the lower courts, that Congress intended to incorporate in the CDA. Secondly, the policy of promoting online content screening would be furthered, not undermined, if § 230(c) were construed to allow distributor liability because of the effect of subsection (2) of the Good Samaritan exemption which the Fourth Circuit failed to address. The intent of Congress was to codify the standard set forth in *Cubby, Inc.*

The Fourth Circuit also engaged in a sweeping policy declaration, divorced from any specific reference to § 230 or legislative history that:

> If computer service providers were subject to distributor liability, they would face liability each time they receive notice of a potentially defamatory statement--from any party, concerning any message.[8]

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[8] Contrary to the Circuit Court's assertion of the burden on OSPs by treating AOL as a distributor, AOL asserted itself to be a distributor and not a publisher (see ¶ 2.7. to Addendum to Plaintiff's Petition for Rehearing and Suggestion for Hearing En Banc) and AOL had already specifically reserved the right to itself to police its service and terminate memberships for improper conduct in violation of detailed Terms of Service and Rules of the Road. (¶ 8.2, Id.).

In making this analysis as a matter of policy, the Fourth Circuit has manifestly departed from any accepted rule of judicial construction and invaded the province of the legislature in its rationale for affirming the District Court on such reasoning. The construction of § 230 of the CDA does not represent a faithful interpretation of congressional intent. Section 230 was plainly intended to encourage interactive computer services to restrict access to injurious content.[9] Under the rule announced below, computer service providers would be completely immune from any liability, and therefore would have no incentive to respond to notification by parties, especially non-AOL members, being injured by posted content-especially those posted anonymously because of AOL's corporate policy of allowing prospective "members" to go online before their identity is confirmed.

2. Section 230(d)(3)

Congress has expressly limited the impact of the CDA on existing state laws by providing that only those state laws inconsistent with the other subparts of the section are unenforceable. Congress provided specific restrictions on liability of an "interactive computer service" to either "actions taken in good faith to restrict access to the availability" of

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[9] In a floor colloquy between the House authors, Congressman Cox stated:

> Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability if they police their systems. . . The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems. 141 Cong. Rec. H 8460, 8471 (August 5, 1995).

Contrary to the clear purpose of the CDA, the effect of the Circuit's decision is to reward OSPs like AOL that do absolutely nothing-the proverbial "Bad Samaritan".

certain material (§ 230(c)(2)(A)) or "any action taken to enable or make available to information content providers or others technical means to restrict access to material described in paragraph (1)." (§ 230(c)(2)(B)).

Given these limitations on the immunity provided by the CDA, imposing liability on AOL for its negligence under traditional state tort principles is not inconsistent with the purpose of the Act.

E. **The Petitioner's Claims Were Not Barred Even Though the Petitioner's Suit Was Filed After the Effective Date of the CDA.**

The events which give rise to negligence liability for AOL under traditional state tort concepts occurred in April and early May, 1995. The CDA was signed into law in February, 1996. Long prior to adoption of the CDA, plaintiff was setting forth the operative facts of this case and asserting his entitlement to damages from AOL under theories of liability then cognizable.

The issue before this Court is the impact of both *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994) and *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, U.S. ___, 117 S.Ct. 1871 (1997) and whether the Court will further extend its retroactivity jurisprudence.

In *Landgraf* and its companion case, *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 114 S.Ct. 1510 (1994), the Court considered whether two sections of the Civil Rights Act of 1991 should be given retroactive effect to a decision on appeal. The initial inquiry is whether Congress has provided for such a retroactive effect. The court observed:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to

> determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. Id. at 1505.[10]

In *Landgraf* the court meticulously reviewed the legislative history and statutory language of the Civil Rights Act and determined that Congressional intent to apply the new provisions retroactively was not justified. Id, at 1489-96. In *Landgraf* the court noted:

> A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date. Id. at 1491.

In the absence of express Congressional intent or through application of the rules of statutory interpretation if retroactivity is not found, then other rules must be looked to:

> When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. Id. at 1505.

In *Hughes Aircraft*, the Court cautioned that *Landgraf*:

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[10] AOL does not argue that Congress has specifically provided for retroactive effect of § 230 of the CDA-and Congress undoubtedly could have done so.

> does not purport to define the outer limit of impermissible retroactivity. Rather, our opinion in *Landgraf*, like that of Justice Story, merely described that any such effect constituted a sufficient[11], rather than a necessary, condition for invoking the presumption against retroactivity . . . and made no suggestion that Justice Story's formulation was the exclusive definition of presumptively impermissible retroactive legislation. *Hughes Aircraft*, 117 S.Ct. at 1876.

The Circuit Court appears to hold that retroactively (i.e. after all of the seminal events have been completed) effecting the elements of causes of action (or completely eliminating all available causes of action) is different if the party is a plaintiff than if it is a defendant-a one way street over which only defendants may travel. Nothing in *Landgraf* as explicated by *Hughes Aircraft* so limits the rights free from retroactive denial to only defendants or would not extend the protection of the law for plaintiffs to events which predated the adoption of the legislation. The focus of the *Landgraf*/*Hughes Aircraft* analysis is the "potential unfairness of retroactive application". *Landgraf*, 114 S.Ct. at 1501. The Court of Appeals quite simply "attached new consequences to a completed act". Id.

It would be manifestly unfair under these circumstances to deprive Petitioner of well-established state tort remedies against AOL for its negligence in taking no action or long-overdue action when finally goaded by the FBI, Secret

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[11] "i.e whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* at 1505. Arguably, if the *Landgraf* examples were the outer limits of retroactivity, Petitioner's rights were sufficiently "impaired" to meet even this restrictive standard.

Service and local police-turning Section 230's Title literally on its head-offering protection for refusing to block and refusing to screen the incendiary Ken Z postings.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE ERROR OF THE COURT BELOW ADVERSELY IMPACTS THE PUBLIC INTEREST AND SAFETY AND THIS CASE PRESENTS THE COURT THE FIRST OPPORTUNITY TO INTERPRET THE LIMITS OF THE IMMUNITY GRANTED ON LINE SERVICE PROVIDERS BY THE CDA.

The Petitioner's petition for a writ of *certiorari* should be granted because of the major distinctive features of this case: (1) it involves a proprietary, private member-only on-line service, not the Internet; (2) it involves civil, not criminal liability; (3) it involves federal law overriding state tort law, an area traditionally left to the states, expressly recognized by § 230(d)(3); (4) it is the first case interpreting section 230(c) and the interplay between sections 230(c) and 230(d), (5) it is of great public importance and interest, and (6) the consequence of the decision below is to encourage criminal conduct.

(1) Despite repeated references to the Internet in both decisions below, this case involves a very different type of "interactive computer service": to go online one has to become a member; provide name, address, phone number, and credit card number; agree to a specified code of online conduct ("Terms of Service" and "Rules of the Road"), the violation of which subject the member to termination, etc. These

significant differences impact directly on the public policy question of imposing distributor liability on an OSP such as AOL.

(2) This Court has previously reviewed the criminal provisions of the CDA (47 U.S.C. § 223) in *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997), which focused on the Internet. The Court affirmed the lower court's conclusion that provisions banning "indecent" communications violated the First Amendment, but left the prohibitions relating to obscene communications intact. 117 S.Ct. at 2350. The Court has not yet considered the CDA's impact on civil tort liability, an area of growing public impact and concern.

(3) The District Court preempted a traditional area of state interest, tort law, because it conflicted with a supposed extension of the language of § 230(c) to a distributor (which is, of course, not in the section itself) and the purpose discerned in the CDA itself by the Court. *Zeran*, 958 F.Supp. at 1133-335.

Eschewing the traditional preemption analysis used below, the Court of Appeals opinion found a purpose of the CDA was to "eliminate the threat that tort-based lawsuits pose to freedom of speech", which necessitated the extension of publisher immunity to distributors. Of course nothing in § 230(c) refers to any such concern, nor does any of extent legislative history. In point of fact, the titles to sections 230 and 230(c) reflect Congressional concern to the contrary as does the CDA-**limitations** on speech by encouraging a provider of an interactive computer service to "restrict access to or the availability of material **that the provider or user considers** to be obscene . . . harassing, or otherwise objectionable, **whether or not such material is constitutionally protected**" (§ 230(c)(2)(A), emphasis supplied) and protecting "any action taken to enable or make

available to information content providers or others the technical means to restrict access to material described in paragraph (1)" (§ 230(c)(2)(B).

Moreover, the Court of Appeals' determination that instead "of subjecting themselves to possible lawsuits, service providers would likely eschew any attempts at self-regulation" (129 F.3d at 333), ignores the immunity provided even distributors for "any action voluntarily taken in good faith to restrict access or availability of material" under § 230(c)(2)(A).

(4) No case involving the CDA has yet reached this stage and this Petition presents the Court with an opportunity to determine these novel issues of public significance.

(5) This case has already been the subject of a number of commentaries. e.g. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Albany L.Rev. 147 (1997), (criticizing the District Court decision)[12]; Ballon, *Defamation and Preemption Under the Telecommunications Act of 1996: Why The Fourth Circuit's Ruling in* ***Zeran v. America Online, Inc.*** *is Wrong*, (in press) Journal of Internet Law, March 1998.[13]

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[12] The author asserts that imposing liability on the provider is likely the only way to protect a defamed plaintiff, observing:

> This is particularly applicable to Zeran. AOL after all controlled its own servers, and Zeran had no ability to remove the defamatory messages himself. Furthermore, since neither Zeran nor AOL could identify the person who posted the messages, Zeran could neither motivate that person to remove them nor sue him for damages. Id. at 173.

[13] As the title suggests, the author is highly critical of both the decisions below. This article will also be contained in the author's treatise, *The Law of the Internet* (Glasser Legal Works 1998).

Additionally, it raises the specter of a totally innocent individual being victimized because of corporate policies (recruiting new members with trial memberships without verifying their identity, refusing to notify its members that the posting is bogus, not adopting available blocking technology to stop repeated postings, etc.) deprived of any remedy against the party that originally posted (anonymously) and stripped of any relief against the OSP responsible for the original posting (by not verifying identity and letting the culprit online), for continuing injuries (by not alerting its members) and for subsequent postings (by not blocking them). The term "Kafkaesque" was made for this case. With total impunity for its acts[14], the public, especially AOL non-members unable to defend themselves, are at the mercy of an AOL with no interest in carrying out the true purposes of § 230.

(6) Because AOL's corporate policy allows individuals to go online with assurance of escaping detection[15], interpreting sections 230(c) and (d)(3) to immunize AOL for this negligent act (intentionally undertaken) contradicts a specific Congressional purpose expressed in sections 230(b)(5) and (d)(1)-indeed, it encourages anonymous computer crime, crime committed in such a way as to incite many others (understandably incensed at the purveyor of the "naughty" t-shirts) to violate 47 U.S.C. § 223(a)(1)(C) by making threatening, harassing phone calls.

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[14] AOL contended at the District Court that AOL would be immune from liability even if "AOL knew of the defamatory nature of the material and made a decision not to remove it from the network based upon a malicious desire to cause harm to the party defamed." *Zeran*, 958 F.Supp. at 1133 n. 20.

[15] The worst fate for such a criminal is to have the bogus membership canceled. Of course, as happened here, a new trial membership with yet a new identity can be established within minutes and the crime spree resumed.

The Court should grant certiorari to review these matters of great importance and resolve these issues of first impression concerning § 230 of the CDA.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' APPLICATION OF THE CDA TO RETROACTIVELY BAR PETITIONER'S STATE TORT CLAIM CONFLICTS WITH THE COURT'S RECENT RETROACTIVITY JURISPRUDENCE.

The Court should grant *certiorari* to extend its recent decisions in *Landgraf* and *Hughes Aircraft* to address the rights of tort plaintiffs such as Petitioner to recover for completed acts of negligence committed before the effective date of legislation like the CDA, especially where the petitioner clearly manifested reliance upon the law existing at the time of the completed events which gave rise to liability and took affirmative steps to pursue his available remedies **and** the CDA contains no clear intention to apply retroactively.

There can be no doubt that Petitioner repeatedly manifested his reliance upon settled case law long before the adoption of the CDA and applying § 230(c) retroactively would render it extremely unfair to dismiss plaintiff's claims.[16]

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[16] The Circuit Court's opinion is clearly incorrect when the court stated:

> Furthermore, Zeran cannot point to any action he took in reliance on the law prior to prior to § 230's enactment. 129 F.3d at 335.

All of this material was presented to the District Court to rebut an argument by AOL that Petitioner's crafty lawyers had concocted a new negligence theory to avoid the CDA and that such the court should reject

These include:

1. plaintiff took immediate action to notify AOL of the incendiary posting and followed it up with many communications to AOL to remove the posting and avoid others from being posted (Complaint ¶¶ 7, 12, 13, 14, 24, 25, 28, and 33);

2. AOL failed to take prompt action on plaintiff's request to remove the posting, refused to post a retraction or notice that the posting was false, and failed to take steps to preclude repostings (Complaint, ¶¶ 42-45);

3. Because of the negligent manner in which AOL solicits its new members, AOL (and the FBI and Secret Service too) was, and remains to this day, unable to identify the AOL member who joined using bogus information that triggered hundreds of criminal, harassing phone calls; the person(s) who posted the Ken Z postings changed his bogus information at least twice and used new (deceptively similar) screen names. (see Exs. 3, 4 and 5 and Ex. 6, Answer to Interrogatory 3, # 15, all attached to Petitioner's Brief in Opposition to Defendant's Motion for Judgment on the Pleadings).

4. Plaintiff's counsel asserted from the earliest time that AOL was liable as a distributor and not a publisher, establishing plaintiff's reliance on the law as it undeniably existed prior to the adoption of the CDA. (Exs. D and E to Kayser Aff. attached to Petitioner's Brief in Opposition to Defendant's Motion for Judgment on the Pleadings);

5. Before the effective date of the CDA, plaintiff instituted an action for damages arising from an Oklahoma City radio broadcast which was a direct and foreseeable result

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such attempts by "creative litigants".

of AOL's negligence; the basic allegations in the Complaint against Diamond Broadcasting, Inc. are identical to those in the Complaint against AOL. (see footnote 1, supra).

6. All of the acts which give rise to AOL's tort liability occurred (were completed) long before the adoption of the CDA.

The Court should determine that the "potential unfairness of retroactive application" under *Landgraf* and *Hughes Aircraft* precludes the elimination of Petitioner's sole remedy by the Court of Appeal's interpretation of retroactivity principles.

CONCLUSION

This case presents novel questions of exceptional importance for the Court and this country and its future. Only by addressing these questions can the rights of its citizens and the Petitioner be vindicated. The Court faces a "Y" in the road on the information superhighway. The choices made by the Court will lead us in one direction or the other. Such a weighty choice deserves the full consideration by the Court. The writ should be granted.

DATED: March 9, 1998

Respectfully submitted,

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KENNETH M. ZERAN, Plaintiff-Appellant,	)	
v.	)	No.97-1523
AMERICA ONLINE, INCORPORATED, Defendant-Appellee.	)	

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T. S. Ellis, III, District Judge.
(CA-96-1564-A)

Argued: October 2, 1997

Decided: November 12, 1997

Before WILKINSON, Chief Judge, RUSSELL, Circuit Judge, and BOYLE, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Russell and Chief Judge Boyle joined.

COUNSEL

ARGUED: John Saul Edwards, LAW OFFICES OF JOHN S.EDWARDS, Roanoke,Virginia; Leo Kayser, III, KAYSER & REDFERN, New York, New York, for Appellant. Patrick Joseph Carome, WILMER, CUTLER & PICKERING, Washington, D.C., for Appellee. **ON BRIEF:** John Payton, Samir Jain, WILMER, CUTLER & PICKERING, Washington, D.C.; Randall J. Boe, AMERICA ONLINE, INC., Dulles, Virginia, for Appellee.

OPINION

WILKINSON, Chief Judge:

Kenneth Zeran brought this action against America Online, Inc. ("AOL"), arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The district court granted judgment for AOL on the grounds that the Communications Decency Act of 1996 ("CDA") -- 47 U.S.C. § 230 -- bars Zeran's claims. Zeran appeals, arguing that § 230 leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services. He also contends that § 230 does not apply here because his claims arise from AOL's alleged negligence prior to the CDA's enactment. Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties. Furthermore, Congress clearly expressed its intent that § 230 apply to lawsuits, like Zeran's, instituted after the CDA's enactment. Accordingly, we affirm the judgment of the district court.

I.

"The Internet is an international network of interconnected computers," currently used by approximately 40 million people worldwide. *Reno v. ACLU*, 117 S. Ct. 2329, 2334 (1997). One of the many means by which individuals access the Internet is through an interactive computer service. These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service's individual proprietary network. *Id.* AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company's millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber.

The instant case comes before us on a motion for judgment on the pleadings, see Fed. R. Civ. P. 12(c), so we accept the facts alleged in the complaint as true. *Bruce v. Riddle*, 631 F.2d 272, 273 (4th Cir.1980). On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts." The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call "Ken" at Zeran's home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his

predicament. The employee assured Zeran that the posting would be removed from AOL's bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting from its bulletin board.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran's phone number, to ask for "Ken," and to "please call back if busy" due to high demand. The angry, threatening phone calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City news- paper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the Western District of Oklahoma. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the party who posted the offensive messages.[17] After Zeran's suit against AOL was transferred to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a), AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The district court granted AOL's motion, and Zeran filed this appeal.

II.

A.

Because § 230 was successfully advanced by AOL in the district court as a defense to Zeran's claims, we shall briefly examine its operation here. Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL. The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party. The relevant portion of § 230 states: "No provider or user of

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[17] Zeran maintains that AOL made it impossible to identify the original party by failing to maintain adequate records of its users. The issue of AOL's record keeping practices, however, is not presented by this appeal.

an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).[18] By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content -- are barred.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive

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[18] Section 230 defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). The term"information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(e)(3). The parties do not dispute that AOL falls within the CDA's "interactive computer service" definition and that the unidentified third party who posted the offensive messages here fits the definition of an "information content provider."

government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, *with a minimum of government regulation.*" *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States . . .to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*" *Id.* § 230(b)(2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.

Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. *See Renov. ACLU*, 117 S. Ct. at 2334 (noting that at time of district court trial, "commercial online services had almost 12 million individual subscribers"). The amount of information communicated via interactive

computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). There, the plaintiffs sued Prodigy -- an interactive computer service like AOL -- for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a

publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

B.

Zeran argues, however, that the § 230 immunity eliminates only publisher liability, leaving distributor liability intact. Publishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 810 (5th ed. 1984). According to Zeran, interactive computer service providers like AOL are normally considered instead to be distributors, like traditional news vendors or book sellers. Distributors cannot be held liable for defamatory statements contained in the materials they distribute unless it is proven at a minimum that they have actual knowledge of the defamatory statements upon which liability is predicated. *Id.* at 811 (explaining that distributors are not liable "in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published"). Zeran contends that he provided AOL with sufficient notice of the defamatory statements appearing on the company's bulletin board. This notice is significant, says Zeran, because AOL could be held liable as a distributor only if it acquired knowledge of the defamatory statements' existence.

Because of the difference between these two forms of

liability, Zeran contends that the term "distributor" carries a legally distinct meaning from the term "publisher." Accordingly, he asserts that Congress' use of only the term "publisher" in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore,his suit should be permitted to proceed against AOL. We disagree. Assuming *arguendo* that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.

The terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. Restatement (Second) of Torts § 558(b) (1977); Keeton et al., *supra*, § 113, at 802. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party -- each alleged by Zeran here under a negligence label -- constitute publication. Restatement (Second) of Torts § 577; *see also Tacket v. General Motors Corp.*, 836 F.2d 1042, 1046-47 (7th Cir. 1987). In fact, every repetition of a defamatory statement is considered a publication. Keeton et al., *supra*, § 113, at 799.

In this case, AOL is legally considered to be a publisher. "[E]veryone who takes part in the publication . . . is charged with publication." *Id.* Even distributors are considered to be publishers for purposes of defamation law:

> Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents -- including the defamatory content -- and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

Id. at 803. AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity.

Zeran contends that decisions like *Stratton Oakmont* and *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), recognize a legal distinction between publishers and distributors. He misapprehends, however, the significance of that distinction for the legal issue we consider here. It is undoubtedly true that mere conduits, or distributors, are subject to a different standard of liability. As explained above, distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability. But this distinction signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned. *See* Keeton et al., *supra*, § 113, at 799-800 (explaining that every party involved is charged with publication, although degrees of legal responsibility differ). To the extent that decisions like *Stratton* and *Cubby* utilize the terms "publisher" and "distributor" separately, the decisions correctly describe two different standards of liability. *Stratton* and *Cubby* do not, however, suggest that

distributors are not also a type of publisher for purposes of defamation law.

Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability. The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability -- the publisher role.

Our view that Zeran's complaint treats AOL as a publisher is reinforced because AOL is cast in the same position as the party who originally posted the offensive messages. According to Zeran's logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original poster of the offensive messages would be found liable. If the original party is considered a publisher of the offensive messages, Zeran certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements.

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part IIA. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service

providers' incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement -- from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. *Cf. Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (recognizing that it is unrealistic for network affiliates to "monitor incoming transmissions and exercise on-the-spot discretionary calls"). Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech). Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

Similarly, notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further

possible lawsuits, service providers would likely eschew any attempts at self-regulation.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Zeran finally contends that the interpretive canon favoring retention of common law principles unless Congress speaks directly to the issue counsels a restrictive reading of the § 230 immunity here. *See United States v. Texas*, 507 U.S. 529, 534 (1993). This interpretive canon does not persuade us to reach a different result. Here, Congress has indeed spoken directly to the issue by employing the legally significant term "publisher," which has traditionally encompassed distributors and original publishers alike.

The decision cited by Zeran, *United States v. Texas*, also recognized that abrogation of common law principles is appropriate when a contrary statutory purpose is evident. *Id.* This is consistent with the Court's earlier cautions against courts' application of the canon with excessive zeal: "`The rule that statutes in derogation of the common law are to be

strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.'" *Isbrandtsen Co.v. Johnson*, 343 U.S. 779, 783 (1952) (quoting *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930); *cf. Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110-11 (1991) (statute need not expressly delimit manner in which common law principle is abrogated). Zeran's argument flies in the face of this warning. As explained above, interpreting § 230 to leave distributor liability in effect would defeat the two primary purposes of the statute and would certainly "lessen the scope plainly intended" by Congress' use of the term "publisher."

Section 230 represents the approach of Congress to a problem of national and international dimension. The Supreme Court underscored this point in *ACLU v. Reno*, finding that the Internet allows "tens of millions of people to communicate with one another and to access vast amounts of information from around the world.[It] is `a unique and wholly new medium of worldwide human communication.'" 117 S. Ct. at 2334 (citation omitted). Application of the canon invoked by Zeran here would significantly lessen Congress' power, derived from the Commerce Clause, to act in a field whose international character is apparent. While Congress allowed for the enforcement of "any State law that is consistent with [§ 230]," 47 U.S.C. § 230(d)(3), it is equally plain that Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action. Section 230(d)(3) continues: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." With respect to federal-state preemption, the Court has advised: "[W]hen Congress has `unmistakably . . . ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. The result is compelled whether Congress'

command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citations omitted). Here, Congress' command is explicitly stated. Its exercise of its commerce power is clear and counteracts the caution counseled by the interpretive canon favoring retention of common law principles.

III.

The CDA was signed into law and became effective on February 8, 1996. Zeran did not file his complaint until April 23, 1996. Zeran contends that even if § 230 does bar the type of claim he brings here, it cannot be applied retroactively to bar an action arising from AOL's alleged misconduct prior to the CDA's enactment. We disagree. Section 230 applies by its plain terms to complaints brought after the CDA became effective. As noted in Part IIB, the statute provides, in part: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3).

Initially, it is doubtful that a retroactivity issue is even presented here. Retroactivity concerns arise when a statute applies to conduct predating its enactment. Section 230 does not directly regulate the activities of interactive computer service providers like AOL. Instead, § 230 is addressed only to the bringing of a cause of action. Here, Zeran did not file his complaint until over two months after § 230's immunity became effective. Thus, the statute's application in this litigation is in fact prospective. *See St. Louis v. Texas Worker's Compensation Comm'n*, 65 F.3d 43, 46 (5th Cir. 1995) (holding "issue is not technically one of retroactivity" when statute applies to "filing of the complaint"), *cert. denied*, 116 S. Ct. 2563 (1996); *Vernon v.*

Cassadega Valley Central Sch. Dist., 49 F.3d 886, 889 (2d Cir. 1995) (same).

Even if this were a case implicating the application of a federal statute to pre-enactment events, the Supreme Court's *Landgraf* framework would nevertheless require § 230's application to Zeran's claims. *Landgraf* instructs us first "to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). This case can be resolved at this first step. In § 230(d)(3), Congress clearly expressed its intent that the statute apply to any complaint instituted after its effective date, regardless of when the relevant conduct giving rise to the claims occurred. Other circuits have interpreted similar statutory language to clearly express Congress' intent that the relevant statutes apply to bar new actions under statutorily specified conditions. *See Wright v. Morris*, 111 F.3d 414, 418 (6th Cir. 1997) (holding language "No action shall be brought . . . ," 42 U.S.C. § 1997e(a), to "expressly govern[ ] the bringing of new actions"), *cert. denied*, 1997 WL 275340(U.S. Oct. 6, 1997); *Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir. 1996) (holding language "In no event shall a prisoner bring a civil action or appeal a judgment . . . ," 28 U.S.C. § 1915(g), to govern the bringing of new actions or filing of new appeals).

If we were to find a directive as plain as § 230(d)(3) to be ambiguous as to Congress' intent, we would be announcing a new super-clear-statement condition for the retroactive operation of statutes. Such a jurisprudential shift would be both unwise and contrary to the Court's admonitions in *Landgraf*: "Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." 511 U.S. at

267-68. Here, Congress decided that free speech on the Internet and self-regulation of offensive speech were so important that § 230 should be given immediate, comprehensive effect.

There finally is a significant contrast between statutes that impose new liabilities for already-completed conduct and statutes that govern litigants' access to courts. For example, courts often apply intervening statutes that restrict a court's jurisdiction. *See Landgraf*, 511 U.S. at 274. Section 230 neither imposes any new liability on Zeran nor takes away any rights acquired under prior law. No person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim. *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986). Furthermore, Zeran cannot point to any action he took in reliance on the law prior to § 230's enactment. Because § 230 has no untoward retroactive effect, even the presumption against statutory retroactivity absent an express directive from Congress is of no help to Zeran here.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 9, 1997

No. 97-1523
CA-96-1564-A

KENNETH M. ZERAN

Plaintiff - Appellant

v.

AMERICA ONLINE, INCORPORATED

Defendant - Appellee

NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, INCORPORATED

Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court as well as the National Law Center for Children and Families' motion to participate as amicus curiae and to file a brief as amicus curiae in support of the petition for rehearing.

The Court grants the motion to participate as amicus curiae and to file a brief as amicus curiae in support of the petition for rehearing.

As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and Suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Wilkinson with the concurrence of Judge Russell and Judge Boyle, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

For the Court,

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KENNETH M. ZERAN, Plaintiff,	)	
v.	)	Civil Action 96-952-A
AMERICA ONLINE, INC., Defendant.	)	

MEMORANDUM OPINION

Plaintiff Kenneth M. Zeran ("Zeran") was the victim of a malicious hoax perpetrated via the Internet[19] services of defendant America Online, Inc. ("AOL"). An unknown person or persons. acting without Zeran's knowledge or authority, affixed Zeran's name and telephone number to a series of notices on AOL's electronic "bulletin board" advertising t-shirts and other items with slogans glorifying the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma in which 168 people were killed. Predictably, Zeran received numerous disturbing and threatening telephone calls from people outraged with the

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[19] The "Internet", as the term is used here, refers to the immeasurable network of computers interconnected for the purpose of communication and information exchange. This network can be accessed in a variety of ways, including through commercial "online services" such as American Online, Inc. These commercial services offer access to their own computer network and organizational software allowing subscribers to interconnect easily with computer networks other than those proprietary to the "online service." See American Civil Liberties Union v. Reno, 929 F.Supp. 824, 930-38 (E.D. Pa. 1996), prob. juris. noted, 117 S.Ct. 554 (1996) (explaining in considerable detail the creation, development, operation and private regulation of the Internet).

posted notice. He now sues, claiming AOL was negligent in allowing these notices to remain and reappear on AOL'S "bulletin board" despite having received notice and complaints from Zeran following the appearance of the first advertisement.

AOL seeks a threshold dismissal of the claim, pursuant to Rule 12(c), Fed.R. Civ.P., on the basis of the immunity that the Communications Decency Act of 1996 ("the CDA), confers on Internet providers with respect to the information appearing on their services from third party sources. Defendant responds by asserting that the CDA does not bar Zeran's claim, or, in the alternative, that it is inapplicable to his claim. Thus, the questions presented are:

> (1) whether the CDA preempts a state law negligence claim against an interactive computer service provider for that provider's allegedly careless dissemination of defamatory statements; and
>
> (2) whether the CDA applies to causes of action brought after its effective date, but arising out of events occurring before that date.

I[20]

AOL's interactive computer services provide a variety of methods to transmit information, including both private communications such as electronic mail, and public communications. One means of public communication is an

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[20] Although AOL denies various allegations contained in the complaint, it appears that few, if any material facts are in dispute. In any event, for the purposes of this Rule 12(c) motion, Zeran is entitled to a review of the pleadings in the light most favorable to him, with the benefit of all reasonable inferences. See, e.g., Madonna v. United States, 878 F.2d 62, 65 (2nd Cir. 1989).

AOL "bulletin board", which allows AOL subscribers to post messages for review by AOL's other subscribers. At 2:54 p.m. on April 25, 1995, a notice appeared on AOL's bulletin board authored by an unknown person or persons identified only as "Ken ZZ03" and titled "Naughty Oklahoma T-Shirts". The notice advertised t-shirts with vulgar and offensive slogans related to the Oklahoma City tragedy.[21] Readers were invited to call "Ken", Zeran's first name, at Zeran's telephone number. This posting was made without Zeran's knowledge or authority and it is undisputed that he has never been involved in any way with the sale of the advertised t-shirts. Indeed, Zeran has never subscribed to AOL's Internet services.

This posting of the bogus notice on AOL's bulletin board, an act within the capacity of even novice Internet users, had its intended pernicious effect. Zeran was inundated with calls, most of which were derogatory and some of which included death threats and intimidation. On April 25, 1995, the day the notice first appeared, Zeran also received a call from a reporter investigating the advertisement of the tasteless t-shirts. Zeran informed the reporter that he was neither responsible for, nor associated with, the advertisement, and that he planned to contact AOL to demand prompt removal of the notice and a retraction. Zeran did precisely this that same day, and an AOL representative assured him that the offending notice would be removed. As a matter of policy, however, AOL declined to post a retraction on its network. To his dismay, Zeran continued to be inundated with offensive and threatening telephone calls. Unable to suspend or change his telephone

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[21] In the first notice, six slogans were allegedly available, including "Visit Oklahoma ... It's a BLAST !!!", "Putting the kids to bed ... Oklahoma 1995", and "McVeigh for President 1996".

number due to business necessity,[22] Zeran was forced to tolerate the harassment and threats occasioned by the hoax.

It appears that while the first notice was deleted from AOL by April 26, 1995, a new notice appeared on the network that same date under a slightly modified identifier of "Ken ZZ033". This second notice declared that some t-shirts from the prior day's notice had "SOLD OUT", and announced that several new slogans were now available.[23] The second notice also announced that one dollar from every sale would be donated to the victims of the bombing. And, as with the first notice, this notice ended by listing Zeran's first name and telephone number.

Zeran learned of the second notice when he received a telephone call on April 26, 1995, from a reporter who faxed him a printed copy of the April 26, AOL posting. Again the barrage of threatening and angry phone calls began. And Zeran once again called AOL to demand that AOL delete the notice and take steps to block further bogus messages using his name and phone number. In response, an AOL operator advised him that steps were being taken to delete the notice and terminate the account that was posting the notices. The operator also suggested to Zeran that he call the police and report this incident. Zeran accepted this

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[22] The record reflects that Zeran operates a publishing business from his home in Seattle, Washington. Specifically, Zeran's publications include a monthly listing of apartments available in the Puget Sound area. He contends that these listings, as well as his other commercial ventures he operates, depend on his ability to communicate frequently with businesses via a publicized telephone number. This publicized telephone number is the number listed in the bogus AOL notice.

[23] The new slogans were at least as vulgar and offensive as those listed in the prior day's notice. Among the new slogans were "Forget the rescue, let the maggots take over --Oklahoma 1995", and "Finally a day care center that keeps the kids quiet -- Oklahoma 1995".

suggestion and called the FBI in Seattle to report the situation. Despite AOL's assurance that the notice would be promptly deleted, various similarly offensive notices continued to appear through May 1, 1995. These notices, like those posted earlier, purported to be authored by "Ken Z033" and advertised offensive Oklahoma City bombing paraphernalia, including bumper stickers, key chains and t-shirts, and even computer software and hardware packages.

Zeran claims that in the final days of April he received a flood of abusive telephone calls, one approximately every two minutes. To make matters worse, a copy of the April 25 notice was brought to the attention of Mark Shannon, a broadcaster at radio station KRXO in Oklahoma City. On May 1, 1995, Shannon read the slogans from the notice on the air, and encouraged listeners to call "Ken" at Zeran's telephone number to register their disgust and disapproval. This predictably resulted in yet another cascade of threatening, intimidating, and angry telephone calls to Zeran. So threatening and abusive were some callers that local police kept Zeran's house under protective surveillance. Although an Oklahoma City newspaper ran a story exposing the t-shirt advertisements as a hoax and the radio station broadcast an apology,[24] this brought Zeran little relief. He received some apologies and offers of assistance from earlier callers, but the deluge of threatening and abusive telephone calls persisted. Not until May 15, 1995, did the threatening and abusive telephone calls subside to approximately fifteen per day.

Zeran filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the

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[24] Zeran characterizes KRXO's on-air apology as "disingenuous". The accuracy of this characterization is immaterial to the disposition of the motion at bar.

Western District of Oklahoma. In April 1996, he filed this separate action against AOL in the same court, alleging that AOL was negligent in failing to respond adequately to the bogus notices on its bulletin board after being made aware of their malicious and fraudulent nature. In response, AOL filed a motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), Fed.R.Civ.P., or, in the alternative, to transfer the action, pursuant to 28 U.S.C. §1404(a), from Oklahoma to this district, where AOL maintains its headquarters. By Order dated October 16, 1996, the United States District Court for the Western District of Oklahoma granted the motion to transfer, but deferred the motion to dismiss, stating that the issue of whether the complaint states a claim should be resolved by the transferee forum." On December 13, 1996, AOL answered Zeran's complaint, and now withdraws its motion to dismiss in favor of the instant motion for judgment on the pleadings, pursuant to Rule 12(c), Fed.R.Civ.P.

II.

Judgment on the pleadings, pursuant to Rule 12(c), Fed.R.Civ.P. authorizes resolution of a matter where no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. See Republic Ins. Co. v. Culbertson, 717 F.Supp. 415, 418 (E.D. Va. 1989). In evaluating a Rule 12(c) motion, the pleadings, are viewed in the light most favorable to the non-moving party, and all reasonable inferences are drawn in favor of that party. Madonna v. United States, 878 F.2d 62, 65 (2nd Cir. 1989); see also Bruce v. Riddle, 631 F.2d 272, 274 (4th Cir. 1980). A rule 12(c) dismissal is warranted where the pleadings, construed favorably to the non-movant, make clear that a "plaintiff could prove no set of facts in support of his claim which would entitled him to relief." Bruce, 631 F.2d at 274. Thus, AOL contends that even assuming the truth of Zeran's pleadings and viewing those pleadings in the light most

favorable to him, Zeran cannot recover from AOL.

III.

Zeran sues AOL for negligence, under the theory that distributors of information are liable for the distribution of material which they knew or should have known was of a defamatory character. See Cubby, Inc. v. Compuserve Inc., 776 F.Supp. 135, 141 (S.D.N.Y. 1991) (holding that defendant could not be liable for distributing defamatory statements unless it knew or had reason to know of statements).[25] AOL does not contend for the purposes of this motion that Zeran has to alleged the elements of distributor liability. Instead, AOL contends that this state tort action is preempted by the enactment of the CDA.

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[25] Cubby involves the application of New York defamation law. Neither party addresses the choice of law issue lurking here, namely which state's tort law is applicable to an alleged injury caused by an anonymous posting of a bogus message on an interactive computer system operated by a corporation residing in Virginia where the notice is available for review by online subscribers internationally and results in harm to a plaintiff in Washington. Zeran's complaint was filed in Oklahoma. Thus, the conflict of laws rules of Oklahoma determine what substantive state law applies to the tort alleged in this case. See, e.g., Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). And that law would also apply here, as the law of the transferee forum applies in §1404(a) transfers. Van Dusen v. Barrack, 376 U.S. 612, 639 (1964). Yet, the parties do not address the choice of law issue. Instead, Zeran asserts in his opposition brief, with no citation, that "[t]he negligence of a distributor is actionable in every jurisdiction." AOL does not address this assertion, but simply claims that the CDA bars distributor liability as well as publisher liability under any state's law. In any event, the analysis here proceeds on the assumption that the governing state law would hold, as most state courts do, that distributors of defamatory material are liable if the distributor knew or had reason to know of the defamatory nature of the material. See generally Restatement (Second) of Tort §581 cmt. d (1977).

The CDA was signed into law and became effective on February 8, 1996. Section 230 of the CDA, titled "Protection for private blocking and screening of offensive material", represents an initial federal effort to define the appropriate scope of federal regulation of the Internet. See 47 U.S.C. §230.[26] The CDA does not provide a statutory basis for Zeran's claim, nor does Zeran rely on it for that purpose. Zeran's alleged cause of action is pursuant to a duty he claims state law imposes on distributors to refrain from distributing material they knew or should have known was defamatory. Thus, the question presented is whether the CDA preempts any state common law cause of action Zeran may have against AOL resulting from its role in the malicious hoax perpetrated via AOL's electronic bulletin board.

The preemption of state law causes of action is

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[26] "In relevant part, the CDA provides:

(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL. --

(1) TREATMENT OF PUBLISHER OR SPEAKER. -- No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY. -- No provider or user of an interactive computer service shall be held liable on account of -- (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

mandated, in certain circumstances, by the Supremacy Clause of the Untied States Constitution, which directs that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI §2; see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819). Preemption analysis under the Supremacy Clause properly begins with "the basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981). With this caveat in mind, there are two circumstances in which preemption of a state law cause of action is appropriate, namely, (i) where Congress specifically intends to displace state law in a particular field, and (ii) where state law directly conflicts with federal law.[27]

A.

The Supreme Court has observed that "preemption fundamentally is a question of congressional intent." English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988)). Congress' intent to preempt a particular field can be

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[27] The Supreme Court has observed that preemption is appropriate in three circumstances: (i) where Congress expresses an intent to displace state law, (ii) where Congress implies such an intent, and (iii) where state law conflicts with federal law. See English, 496 U.S. at 78. While this is clearly correct, the first two circumstances are simply two ways in which congressional intent may be discerned. Viewed in this way, the preemption inquiry is broken down into two categories, namely, (i) intentional preemption, express or implied, and (ii) preemption due to direct conflict. See Feikema v. Texaco, Inc., 16 F.3d 1408, 1412 (4th Cir. 1994) ("There are two ways for preemption to occur.") Of course, there is overlap in the examination of preemption under these to theories, and the categorizations are not rigid or exclusive. See English, 496 U.S. at 79 n.5 ("[F]ield pre-emption may be understood as a species of conflict pre-emption ... .").

expressed or implied. Express preemption occurs where Congress "defines explicitly the extent to which its enactments preempt state law", English, 496 U.S. at 78, whereas intent to preempt is implied where a scheme of federal regulation is so pervasive that it leaves no room within which a state may act. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Feikema v. Texaco, Inc., 16 F.3d 1408, 1412 (4th Cir. 1994).[28]

The focus of the inquiry for express preemption is the statutory language.[29] A familiar example of statutory language reflecting Congress' preemption intention can be found in §514(a) of the Employee Retirement Income Security Act ("ERISA"), which provides, in relevant part,

> that provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. §1144(a). The ERISA statute further directs that "State law" superseded by ERISA pursuant to §514(a) includes "all laws, decision, rules, regulations, or other State action having the effect of law, of any state." 29 U.S.C.

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[28] Thus, an examination of intentional preemption is, in essence, a classic exercise in statutory interpretation wherein the statutory language is examined for its plain and unambiguous meaning, with any ambiguities resolved by reference to the statute's purpose. See Ringling Bros. -- Barnum & Bailey Combined Shows, Inc. v. Utah Division of Travel Development, 935 F.Supp. 763, 765 (E.D. Va. 1996).

[29] In English, the Supreme Court observed: [W]hen Congress has made its intent known through explicit statutory language, the courts' task is an easy one. 496 U.S. at 78-79.

§1144(c)(1). And finally, the ERISA statute explicitly exempts certain state laws from preemption, including state laws regulating insurance, banking, or securities, and state criminal laws. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983) (citing 29 U.S.C. §1144(b)). Thus, ERISA explicitly defines the extent to which Congress intended federal preemption of state law.[30]

The CDA, in sharp contrast to ERISA and other similar provisions, contains no explicit expression of congressional intent with respect to the scope of preemption. Section 230 of the CDA section addresses the provision's effect on state law, providing that:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

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[30] For additional examples of statutory language reflecting Congress' intent as to preemption, see 2 U.S.C. §453 ("The provisions of this Act [the Federal Election Campaign Act of 1971], and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."); 15 U.S.C. §1461 (defining the preemptive scope of the federal labeling program) ("It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto."); 29 U.S.C. §633(a) (defining preemptive scope of federal cause of action for age discrimination in employment) ("Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.").

47 U.S.C. §230(d)(3). This provision does not reflect congressional intent to preempt state law remedies for defamatory material on an interactive computer service. To the contrary, §230(d)(3) reflects Congress' clear and unambiguous intent to retain state law remedies except in the event of a conflict between those remedies and the CDA.

This conclusion is supported by the second prong of the intentional preemption inquiry, namely the search for implied preemption. Congressional intent to occupy a field exclusively, and thereby preempt state law, can be implied where Congress has regulated "so pervasively in the field as not to leave any room within which a state may act." Feikem, 16 F.3d at 1412. In other words, where the dominance of federal intervention in a field is such that any state law addressing the field would duplicate or be in direct conflict with federal law, Congress' is held to have intended to preempt the field. As a threshold matter, it is worth noting that where, as here, Congress' is held to have intended to preempt the field. As a threshold matter, it is worth noting that where, as here, Congress has clearly expressed an intent not to preempt the field, the Congressional intent inquiry should ordinarily end. In other words, implied preemption through pervasive occupation of a field is merely a means of determining congressional intent with respect to pre-emption, an exercise unnecessary where, as here, that intent is otherwise clearly expressed.[31] But, nonetheless, that exercise points to the same result.

The purposes and objectives of the CDA support the conclusion that Congress did not intend to occupy the field

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[31] The only exception to this general rule arises when Congress provides expressly for no preemption while simultaneously occupying the field to a degree that no state law may exist without creating a direct conflict. This circumstance is not present here.

of liability for providers of online interactive computer services to the exclusion of state law. Section 230's language and legislative history of reflect that Congress' purpose in enacting that section was not to preclude any state regulation of the Internet,[32] but rather to eliminate obstacles to the private development of blocking and filtering technologies capable of restricting inappropriate online content.[33] This purpose belies any congressional intent to bring about, through the CDA, exclusive federal regulation of the Internet. Accordingly, the CDA reflects no congressional intent, express or implied, to preempt all state law causes of action concerning interactive computer services.

B.

Yet, even where Congress does not intend to occupy a field exclusively, the Supremacy Clause commands preemption of state laws to the extent that such laws directly conflict with federal law.[34] Direct conflicts requiring

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[32] To be sure, the CDA's general policy statements apparently endorse a laissez faire policy with respect to the Internet. See, e.g., 47 U.S.C. §230(b) ("It is the policy of the United States ... (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation ... ."). But the CDA, in fact, neither prohibits state regulation, nor provides a comprehensive federal scheme precluding any state regulatory function.

[33] See, e.g., H.R. 104-458 at 194 (1996) (purpose of §230 of CDA is to provide "Good Samaritan" protection for providers or users of interactive computer services for actions taken to restrict access to objectionable material); see also, infra, Part III-B-3.

[34] Preemption resulting from direct conflict is not only constitutionally mandated, but commanded by the CDA itself. See 47 U.S.C. §230(d)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

preemption exist:

> (1) where it is impossible for a private party to comply with both federal and state law, see, e.g, Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963);
>
> (2) where state law conflicts with the express language of the federal statute, see, e.g., Mobil Oil v. Virginia Gasoline Marketers, 34 F.3d 220, 226 (4th Cir. 1994), cert. denied, 115 S. Ct. 1097 (1995) ("Federal law may preclude state law that is inconsistent with ... the federal law."); and
>
> (3) where state law "`stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" English, 496 U.S. at 79 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

These theories of direct conflict preemption will be addressed in turn.

1. **Impossibility of Compliance with State and Federal Law**

The first type of direct conflict arises where compliance with both federal and state regulations is "a physical impossibility." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (explaining that a federal law prohibiting the sale of avocados with an oil content over 7% would preempt a state law prohibiting the sale of avocados with an oil content under 8% because compliance with both requirements would be impossible). This is not such a case; this is not a case where a party is subjected to contradictory federal and state duties, as in the hypothetical discussed in Florida Lime. Nothing in the CDA

imposes a duty on AOL that would conflict with a state law duty to avoid negligent distribution of defamatory material. Put another way, an interactive computer service provider, like AOL, can comply with the CDA even if it is subjected to state liability for negligent distribution of defamatory material.

2. Conflict with the Language of the CDA

Preemption is also required where state law conflicts with the express language of a federal statute. In this case, Zeran seeks to hold AOL liable for its alleged negligence in allowing the bogus notices to remain and reappear after learning of their fraudulent nature from Zeran. This theory of liability derives chiefly from Cubby, a case decided over four years before the passage of the CDA. Cubby, 776 F.Supp. at 135. In Cubby, the district court concluded that the defendant interactive computer service, CompuServe, was a distributor for the purposes of defamation liability, and thus was liable only if it "knew or had reason to know of the alleged defamatory ... statements." Id. at. This "reason to know" standard is consistent with the standard of liability for entities such as news vendors, book stores, and libraries who, while not charged with a duty to review the materials they distribute, are liable if they distribute materials they knew or have reason to know contain defamatory statements.[35] Thus, Zeran contends that on learning of the fake notice on the AOL bulletin board advertising the tasteless T-shirts, AOL had a duty to take reasonable steps to prevent the distribution of this posting. Zeran further contends that the scope of this reasonable duty, and whether AOL complied with it, are questions for a jury.

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[35] See Restatement (Second) of Torts §581 cmt. d (1977); see, e.g., Dworkin v. Hustler Magazine, Inc., 634 F.Supp. 727, 729 (D. Wyo. 1986) (distributor liability requires either actual knowledge or reason to know that distributed material was defamatory).

AOL responds by contending that a state cause of action for distributor liability is preempted because it directly conflicts with the language of §230 of the CDA. Specifically, AOL points to §230(c)(1), which states that

> [no] provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Zeran does not contest that AOL is an interactive computer service as defined by the CDA and it is clear that AOL meets the statutory definition of such a service.[36] Nor does Zeran claim that the bogus notices were anything but "information provided by another information content provider." Thus, the preemption issue reduces to the question whether a state cause of action for negligent distribution of defamatory material directly conflicts with the CDA's prohibition against treating an Internet provider as a "publisher or speaker". Put another way, the question is whether imposing common law distributor liability on AOL amounts to treating it as a publisher or speaker. If so, the state claim is preempted.

The key to answering this question lies in understanding the true nature of so-called distributor liability and its relationship to publisher liability. At the heart of Zeran's argument is the premise that distributor liability is a

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[36] The CDA defines interactive computer service as:

> any information service, system, or access software provider that provides or enables computer access by multiple users to a computer sever, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. 47 U.S.C. §230(e)(2). AOL provides access for subscribers to a computer server that facilitates access to the Internet.

common law tort concept different from, and unrelated to, publisher liability. This is not so; distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material.[37] This relationship is apparent from the Restatement (Second) of Tort §577 definition of "publication" of defamatory material, which states,

> (1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.
>
> (2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

Thus, a publisher is not merely one who intentionally communicates defamatory information. Instead, the law also treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control.

Illustrative of this point is Tacket v. General Motors Corp., 836 F.2d 1042, 1046 (7th Cir.1987), where the

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[37] To be sure, Zeran is not the first plaintiff to attempt the avoid the strictures of defamation law by disguising a defamation claim as another tort. Courts uniformly reject such attempts. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (plaintiff cannot avoid strictures of defamation law through pleading intentional infliction of emotional distress); Moldea v. New York Times Co., 15 F.3d 1137, 1151 (D.C. Cir. 1994), modified on other grounds, 22 F.3d 310 (D.C. Cir. 1994) (plaintiff cannot avoid strictures of defamation law through pleading alternative tort of false light invasion).

Seventh Circuit considered the liability of an employer who, for approximately eight months, failed to remove an allegedly defamatory sign painted by an unknown third party on the wall of the workplace. In discussing defendant's possible liability, the panel, citing §577(2) of the Restatement (Second) of Torts, stated that to find defendant liable, a jury must conclude that defendant "`intentionally and unreasonably' fail[ed] to remove this sign **and thereby published its contents**." 836 F.2d at 1047 (emphasis added). Thus, failure to remove defamatory material provided by a third party was deemed to constitute a form of "publication." Similarly, distributor liability applies where certain parties, such as news vendors or interactive computer services, will be held to have "published" material provided by third parties because they fail to take reasonable steps to prevent the dissemination of that defamatory information. Properly understood, therefore, distributor liability treats a distributor as a "publisher" of third party statements where that distributor knew or had reason to know that the statements were defamatory. It follows that Zeran's attempt to impose distributor liability on AOL is, in effect, an attempt to have AOL treated as the publisher of the defamatory material. This treatment is contrary to §230(c)(1) of the CDA and, thus, Zeran's claim for negligent distribution of the notice is preempted.[38]

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[38] This preemption conclusion is, of curse, limited to the state law claim for negligent distribution asserted here. This opinion neither addresses nor embraces the broader position advanced by AOL's counsel in oral argument to the effect that the CDA precludes AOL's liability for any information appearing on its system unless that information was provided by AOL itself. By AOL's lights, it is immune from state common law liability for any material on its network as long as that material was put online by a third party. And this is so, AOL's counsel contended, even if AOL knew of the defamatory nature of the material and made a decision not to remove it from the network based on a malicious desire to cause harm to the party defamed. These facts were not presented here, nor do they appear to have been contemplated by Congress. In any event, there is no occasion here to consider whether, under some set of facts,

3. **Conflict with the Purposes and Objectives of the CDA**

An alternative basis for preemption exists if subjecting AOL to state law distributor liability would stand "as an obstacle to the accomplishment of the full purposes and objectives of Congress' in passing §230 of the CDA. See, e.g., English, 496 U.S. at 79. Section 230 itself provides some insight into Congress' purposes and objectives in passing that provision, stating, in part; that

> It is the policy of the United States:
> ...
>
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [and]
>
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material ... .

47 U.S.C. §230(b). The scant legislative history reflects that the "disincentive" Congress specifically had in mind was liability of the sort described in Stratton-Oakmont, Inc. v. Prodigy Service Co., 1995 WL 323771O Sup. Ct. N.Y. May 24, 1995).[39] There, Prodigy, an interactive computer service

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information initially placed online by a third party might be deemed to be information provided by the service provider itself, thereby rendering §230(c) inapplicable.

[39] See H.R. Rep. No. 104-458, at 194 (1996) ("One of the specific purposes of this section is to overrule Stratton-Oakmont v. Prodigy and any other similar decision which have treated providers and users as

provider, was held to have published the defamatory statements of a third party in part because Prodigy had voluntarily engaged in some content screening and editing and therefore knew or should have known of the statements. Congress, concerned that such rulings would induce interactive computer services to refrain from editing or blocking content, chose to grant immunity to interactive computer service providers from suits arising from efforts by those providers to screen or block content.[40] Thus, Congress' clear objective in passing §230 of the CDA was to encourage that development of technologies, procedures and techniques by which objectionable material could be blocked or deleted

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publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.").

[40] 22. Return to Text Section 230(c) creates two distinct forms of immunity. Subsection (c)(1), discussed above, immunizes interactive computer service providers and users from defamation liability premised on theories similar to that proposed in Stratton-Oakmont and, indeed, in this case. See supra Part III-B-2. On the other hand, subsection (c)(2) precludes holding an interactive computer service provider or user liable on account of (i) actions taken in good faith to restrict access to material that the provider or user deems objectionable, and (ii) actions taken to provider or user deems objectionable, and (ii) actions taken to provide others with the technical means to restrict access to objectionable material. Thus, §230(c)(2) appears to immunize such providers and users from causes of action brought by persons whose material is screened or blocked from the Internet. In sum, §230 provides immunity for Internet providers against causes of action brought by persons alleging harm, such as defamation injury, resulting from the dissemination of material. §230(c)(1), and causes of action brought by persons alleging harm resulting from the deletion or restriction of their material. §230(c)(2). Section 230 was expressly not intended to provide immunity for a cause of action for "cancelbotting", wherein recipients of a message respond to the message by deleting the message from the computer systems of others without having the right to do so. See H.R. Rep. 104-458, at 194.

either by the interactive computer service provider itself or by the families and schools receiving information via the Internet. If this objective is frustrated by the imposition of distributor liability on Internet providers, then preemption is warranted. Closely examined, distributor liability has just this effect.

Internet providers subjected to distributor liability are less likely to undertake any editing or blocking efforts because such efforts can provide the basis for liability. For example, distributors of information may be held to have "reason to know" of the defamatory nature of statements made by a third party where that party "notoriously persists" in posting scandalous items. See. e.g., Restatement (Second) or Torts §581 cmt. d. An Internet provider's content editing policy might well generate a record of subscribers who "notoriously persist" in posting objectionable material. Such a record might well provide the basis for liability if objectionable content from a subscriber known to have posted such content in the past should slip through the editing process. Similarly, an Internet provider maintaining a hot-line or other procedure by which subscribers might report objectionable content in the provider's interactive computer systems would expose itself to actual knowledge of the defamatory nature of certain postings and, thereby, expose itself to liability should the posting remain or reappear. Of course, in either example, a Internet provider can easily escape liability on this basis by refraining from blocking or reviewing any online content. This would eliminate any basis for inferring the provider's "reason to know" that a particular subscriber frequently publishes objectionable material. Similarly, by eliminating the hot-line or indeed any means for subscribers to report objectionable material, an Internet provider effectively eliminates any actual knowledge of the defamatory nature of information provided by third parties. Clearly, then, distributor liability discourages Internet providers from engaging in efforts to

review online content and delete objectionable material,[41] precisely the effort Congress sought to promote in enacting the CDA. Indeed, the most effective means by which an Internet provider could avoid the inference of a "reason to know of objectionable material on its service would be to distance itself from any control over knowledge of online content provided by third parties. This effect frustrates the purpose of the CDA and, thus, compels preemption of state law claims for distributor liability against interactive computer service providers. See, e.g., English, 496 U.S. at 79.[42]

In sum, although the CDA does not preempt at state law causes of action concerning interactive computer

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[41] To be sure, the distributor liability theory in Cubby, asserted here by Zeran, is different in some respects from the Stratton-Oakmont liability theory precluded by the CDA. Yet, there is also an important similarity in the two theories; both theories discourage Internet providers from undertaking efforts to block or edit the material on their computer systems by using such efforts as a basis for liability.

[42] The CDA reflects Congress' attempt to strike the right balance between the competing objectives of encouraging the growth of the Internet on one hand, and minimizing the possibility of harm from the abuse of that technology on the other. And, to be sure, various approaches are available for accomplishing Congress' purpose of encouraging the development of online screening technologies and procedures. For example, holding interactive computer service providers strictly liable for the content on their systems would likely lead to rapid development of mechanisms by which to block objectionable material. But Congress struck a different balance between the competing concerns, electing to immunize Internet providers from forms of liability that discourage those providers from acquiring information about and control over the content on their systems. And that decision is appropriately the providence of Congress. But the Internet is a rapidly developing technology -- today's problems may soon be obsolete while tomorrow's challenges are, as yet, unknowable. In this environment, Congress is likely to have reasons and opportunities to revisit the balance struck in CDA.

services, it does preempt Zeran's claim. This is so because his "negligence" cause of action conflicts with both the express language and the purposes of the CDA.

IV.

Zeran contends that even if the CDA preempts a state law cause of action for negligent distribution of defamatory statements, it cannot have that effect here without violating the stricture against retroactive application of statutes. The CDA was signed into law and became immediately effective on February 8, 1996, over nine months after the posting of the bogus notices that form the basis of Zeran's claims against AOL. Yet, Zeran did not file this complaint until April 1996, two months after the CDA went into effect. This, then, is a case brought after a statute's enactment but based on facts that occurred prior to its enactment. In these circumstances, a statute may not have a "retroactive effect" absent a clear expression of congressional intent with respect to such retroactivity. See Landgraf v. USI Film Products, 114 S.Ct. 1483, 1505 (1994). Thus, a court must first determine whether Congress has clearly expressed the statute's intended temporal reach. If so, the judicial inquiry is complete and Congress' clear intent must be implemented. Id. If, on the other hand, the statute has no express Congressional command with respect to its temporal application, courts must undertake a second inquiry to determine whether the application of the statute will result in a prohibited "retroactive effect."[43] Id. In this case, the first

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[43] "Retroactive effect", in this context, has a precise meaning, and is present only where a statute: would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. Landgraf, 114 S.Ct. at 1505. The CDA does not increase the liability of or impose new duties on either party. Thus, the "retroactive effect" question reduces to whether the CDA impairs a right possessed by Zeran. The question whether a not-as-yet filed tort claim constitutes a right protected from

step in dispositive, Congress has made its intent manifest.

Section 230 clearly reflects Congress' intent to apply the CDA to all suits filed after its enactment, notwithstanding when the operative facts arose. Thus, in §230(d)(3), the CDA provides, in pertinent part, that

> [n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

This subsection does not generally refer to conflicting state laws having "no effect" or being "preempted". To the contrary, it specifically provides that "[n]o causes of action may be brought." And such clear statutory language cannot reasonably be construed to mean that only some causes of action may be brought, namely those concerning events arising before the enactment of the CDA. Thus, while Congress has expressed its intent with respect to retroactivity more directly in other circumstances,[44] subsection (d)(3) constitutes an adequately clear statement of Congress' intent to apply §230 of the CDA to claims that are filed after the

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retroactive impairment is unsettled. Compare In the TMI, 89 F.3d 1106, 1113 (3rd Cir. 1996) (statute eliminating pending tort claim does not impair a vested right under due process analysis), with Maitland v. University of Minnesota, 43 F.3d 357, 361-63 (8th Cir. 1994) (declining to apply statute to antecedent events where such application eliminates a possible cause of action relied on by plaintiff); see also Landgraf, 114 S.Ct. at 1499 & 1524 (debate between majority and Justice Scalia concerning scope of rights protected by presumption against statutory retroactivity). This unsettled question need not be resolved here, given that Congress has expressed its intent concerning the application of the CDA to Zeran's cause of action.

[44] See, e.g., The Antiterrorism and Effective Death Penalty Act, §107(a) ("[Provision] shall apply to cases pending on or after the date of enactment of this Act.").

enactment of the CDA.[45] Accordingly, §230 of the CDA applies to Zeran's claim and, as discussed above, preempts his state law negligence cause of action.

In sum, the CDA preempts a negligence cause of action against an interactive computer service provider arising from that provider's distribution of allegedly defamatory material provided via its electronic bulletin board. This preemption is applicable to Zeran's cause of action, brought after the enactment of the CDA, even though the events giving rise to his claim were completed before the CDA became effective. Thus, Zeran can prove no set of facts entitling him to relief against AOL, and AOL's motion for judgment on the pleadings, pursuant to Rule 12(c), Fed.R.Civ.P., must be granted.

An appropriate Order will enter.

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[45] AOL further contends that the CDA applies to all causes of action pending after the statute's enactment date, even if filed before that date. By AOL's lights, Congress' intention to apply the CDA to pending cases is expressed by §230(d)(3)'s provision that "no causes of action of action may be brought and no liability may be imposed" pursuant to laws inconsistent with §230 of the CDA. (emphasis added). AOL relies on the general principle of statutory construction that no provision should be read so as to render superfluous other provisions in the same enactment. See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990). Thus, for the prohibition of "liability" to have any meaning separate from the prohibition of "causes of action", AOL contends such liability must refer to pending causes of action. AOL's argument is not without considerable force, but it is a close question whether such an interpretation of the CDA satisfies the "clear intent" requirement for retroactive application. See Landgraf, 114 S.Ct. at 1501. And, in any event, this close question is immaterial to determining the retroactive application of the CDA to Zeran's cause of action, which was brought two months after the enactment of the CDA.

The Clerk is directed to send copies of this Memorandum Opinion to all counsel of record.

/s/ T.S. Ellis, III

United States District Judge.

Alexandria, Virginia

March 21, 1997